Hastings Law Journal

Volume 59 | Issue 4 Article 4

1-2008

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Notes

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INTRODUCTION

Personal jurisdiction is an area of unquestioned doctrinal significance. *International Shoe Co. v. Washington*[1] has been cited a stunning fifteen thousand times, including almost two thousand law review articles.[2] Personal jurisdiction involves questions of federalism, sovereignty, and due process. It also raises questions of the appropriate limits on those who wish to invoke (and rights of those who wish to avoid) legal process to resolve conflicts between parties. Finally, it involves decisions regarding the effectiveness and efficiency of the legal system itself.

Personal jurisdiction is of great practical importance to litigators, as well as to the trial court judges who need to apply personal jurisdiction doctrines to cases brought before them. In the Ninth Circuit alone, there are dozens of published cases which have continuing precedential significance.[3] District courts in the Ninth Circuit issue dozens of written opinions each year addressing motions to dismiss for lack of personal jurisdiction.[4]

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* J.D. Candidate, May 2008, U.C. Hastings College of the Law. I would like to thank Professors Geoffrey Hazard and Richard Marcus, Dean Mary Kay Kane, and attorneys Gerry Davis, Michael Pyle, and Michael Schaps for their help, encouragement, and advice with this Note. All errors and shortcomings of course are my own.

1. 326 U.S. 310 (1945).

2. A Lexis search of *International Shoe* on February 23, 2007, produced a total of 15,196 citations, including 1,796 law review articles. Other major Supreme Court personal jurisdiction decisions also produced remarkable numbers of citations. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (8,093 citations); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (7,937 citations); Hanson v. Denckla, 357 U.S. 235 (1958) (6,980 citations).

3. This Author's list of published Ninth Circuit cases includes more than one hundred cases dating from 1984. While some of these cases have limited relevance today, many have continuing precedential significance, and continue to be cited by district and appellate courts as well as discussed in law review articles. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir.

These cases also involve high stakes for the litigants themselves. As a threshold matter, the question of personal jurisdiction will often decide whether the case is litigated at all—and will at least decide whether a particular party must be prepared to defend on the merits a suit brought in a foreign jurisdiction. Whether or not an entity will be subject to personal jurisdiction (or, alternatively, able to bring suit against a party) in a given forum may also influence a party's decisions as to where and how it will conduct business. If a corporation, for example, is aware that certain actions will render it subject to suit in a given forum, it may either choose to avoid those activities, or insure itself against the cost of possible suit there.[5]

As noted above, the Ninth Circuit has issued dozens of published personal jurisdiction opinions which have continuing precedential significance. This body of case law, while often well argued and well-reasoned, is at times seemingly confusing and even conflicting when viewed as a whole. This presents substantial problems for Ninth Circuit panels attempting to follow precedent, let alone for the district courts who are attempting to apply the law, the litigators attempting to argue the law, and the litigants attempting to predict outcomes.

Ninth Circuit personal jurisdiction law is an influential body of doctrine,[6] frequently cited and commented on by other federal appellate and district court judges, and also by legal scholars. Ironically, though, given its importance for Ninth Circuit litigants, litigators, and courts, and for personal jurisdiction law in general, there is no single source where Ninth Circuit personal jurisdiction law has been fully, and adequately, characterized. This Note attempts to make a small step in that direction—to state certain major holdings of Ninth Circuit personal jurisdiction case law, tracing the development and current state of the law, and noting unresolved issues.

Ordinarily the statement of the law in a doctrinal area would be more appropriately left to a treatise, rather than to a law review note. Arguably, though, the personal jurisdiction law of a single circuit is an apt subject for a law review note. In many respects, personal jurisdiction law is the law of the federal circuit courts. Partly this is the result of the Supreme Court's confusing, and at times conflicting, personal jurisdiction

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2004); Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280 (9th Cir. 1977).

4. Searching Lexis for Ninth Circuit district court cases containing the terms "personal jurisdiction" and "specific jurisdiction"—a rough proxy for the number of cases addressing personal jurisdiction claims—produces 118 cases for 2006 alone (last searched Mar. 14, 2007).

5. As a central policy rationale behind personal jurisdiction jurisprudence, the Supreme Court cites the importance of providing sufficient predictability, and hence "fair warning," to entities and individuals to enable them to structure their primary behavior with the jurisdictional consequences in mind. *See Burger King*, 471 U.S. at 472.

6. It is both influential and, at times, controversial. *See infra* note 102 and accompanying text.

holdings and reasoning.[7] Even more astonishing, the Supreme Court has not taken a major personal jurisdiction case for twenty years.[8] Lower courts simply don't have enough guidance from the Supreme Court with respect to certain key questions of personal jurisdiction. In addition, the guidance given lower courts by the Supreme Court's landmark personal jurisdiction cases has often been expressed in glittering generalities such as "fair play and substantial justice," rather than as specific doctrinal tests. The Supreme Court has provided lower courts with principles, rather than rules or standards, and the circuit courts have had to supply those rules or standards. Lastly, personal jurisdiction is an inherently difficult, complicated, and fact-dependent inquiry, overlaid with multiple levels of policy and theoretical considerations.[9]

Further, because federal circuit law in the area of personal jurisdiction is so broad and diverse, in order to make a substantive argument about the further development of personal jurisdiction law, an author must choose and limit his focus. On the one hand, an author can focus on a single element in personal jurisdiction law and evaluate its application across the circuits. Alternatively, the author can focus on the law of a single circuit in order to formulate a thesis about personal jurisdiction law as an integrated system. Either approach offers benefits and limits, but the author must choose one. This Note has chosen the latter approach.

My thesis, which will be developed at the end of this Note, is that within the Ninth Circuit the personal jurisdiction inquiry is best conceived of as two sequential balancing tests. First, the court must weigh the non-resident's contacts with the forum against the relationship between those contacts and the cause of action, in order to make a preliminary finding on personal jurisdiction (no jurisdiction, probably no jurisdiction, probable jurisdiction, or jurisdiction). If the court finds either no jurisdiction or jurisdiction in this initial step, the court's inquiry is done. If the court's preliminary finding is probably no jurisdiction, or probable jurisdiction, the court then proceeds to the second phase of the personal jurisdiction inquiry, to assess the preliminary finding against the question of reasonableness. A strong showing on the reasonableness of exercising personal jurisdiction may be able to overcome the preliminary

7. *See, e.g.*, Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 147 (2004) ("It has been twenty years since the decision in *Burger King*, the last of the Court's major personal jurisdiction decisions, and confusion and disagreement are the order of the day.").

8. *See id.*

9. *See, e.g.*, Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487 (9th Cir. 1993) ("[A] categorical approach is antithetical to [the Supreme Court's] admonishment that the personal jurisdiction inquiry cannot be answered through the application of a mechanical test but instead must focus on the relationship among the defendant, the forum, and the litigation within the particular factual context of each case. . . . [This] requires a difficult case-specific analysis.").

finding of probably no personal jurisdiction. Correspondingly, a strong showing that the exercise of personal jurisdiction would be unreasonable may be able to overcome the preliminary finding of probable jurisdiction.

I. NINTH CIRCUIT PERSONAL JURISDICTION LAW

The personal jurisdiction questions that are actively litigated largely fall into two categories, general jurisdiction and specific jurisdiction.[10] General jurisdiction subjects a party to suit for any cause of action for which the forum court has subject matter jurisdiction—regardless of the connection between the forum and the cause of action.[11] On the other hand, a party subject to specific jurisdiction may only be sued for causes of action that arise out of those contacts with the forum which render that party subject to suit. While Ninth Circuit case law, both at the district court and appellate levels, includes a number of interesting general jurisdiction holdings,[12] this Note will focus on specific jurisdiction, as the vast majority of litigated personal jurisdiction cases turn on questions, and the application, of specific jurisdiction law.

A. THE NINTH CIRCUIT'S SPECIFIC JURISDICTION TEST

1. *Two Tests, Not One*

Ninth Circuit case law contains two related formulations of its test for specific jurisdiction—the *Data Disc*[13] test, and the *Lake v. Lake*[14] test. Virtually every appellate opinion and district court opinion in the Ninth Circuit addressing specific jurisdiction utilizes one of these two tests.

a. The Data Disc *Test*

Announced in 1977, *Data Disc* established the Ninth Circuit's standard for evaluating specific jurisdiction. If a non-resident

10. Other, traditional bases of personal jurisdiction, however, while less frequently litigated, continue to be of importance to courts and attorneys, as well as to parties wishing to intelligently structure their primary behavior. Those additional, traditional bases of personal jurisdiction include waiver, consent, transient jurisdiction, domicile, appointment of an agent for service of process, and *in rem* and *quasi in rem* jurisdiction. *See, e.g.*, JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR MILLER, CIVIL PROCEDURE 98–204 (4th ed. 2005).

11. Andrew F. Halaby, *You* Won't *Be Back: Making Sense of "Express Aiming" After* Schwarzenegger v. Fred Martin Motor Co., 37 ARIZ. ST. L.J. 625, 627–28 (2005) ("General jurisdiction over a nonresident defendant is hard to come by because it requires that the defendant [have] continuous and systematic general business contacts that approximate physical presence in the forum state. By definition, nonresident defendants typically lack those contacts, and judicial pronouncements to that effect are legion." (alteration in original) (internal quotations and citations omitted)). General jurisdiction is frequently addressed in judicial opinions and litigant's briefs, and almost as frequently dismissed as inapplicable to the facts of that particular case.

12. *See, e.g.*, Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003) (holding that online retailer was subject to general jurisdiction).

13. Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280 (9th Cir. 1977).

14. Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987).

"defendant's activities are not so pervasive as to subject him to general jurisdiction, the issue whether jurisdiction will lie turns on an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action."[15] To do that evaluation, the court applies the following test:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable.[16]

The three prongs of the *Data Disc* test are often spoken of, in shorthand terms, as the "purposeful availment" test, the "arising out of" test, and the "reasonableness" test.

Although *Data Disc* cited earlier Ninth Circuit precedent for its test, *Data Disc* established the test as Ninth Circuit canon, and, in doing so, became a landmark statement of personal jurisdiction law.[17] The *Data Disc* test continues to be frequently cited by Ninth Circuit appellate and district court opinions.[18]

b. The Lake v. Lake *Test*

The Ninth Circuit has an alternative test for specific jurisdiction, which appears to be as frequently cited as the *Data Disc* test.[19] The *Lake v. Lake* test states:

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15. *Data Disc*, 557 F.2d at 1287.

16. *Id.*

17. *Data Disc* cited a formulation, and a rationale, from *L. D. Reeder Contractors v. Higgins Industries, Inc.*, 265 F.2d 768 (9th Cir. 1959), which itself borrowed its formulation and rationale from a student note published earlier in 1959. The *Data Disc* formulation was almost immediately cited, and regularly followed, by Ninth Circuit appellate and district court opinions alike. While a Lexis search shows that *L. D. Reeder*'s formulation of the same test was cited only six times by Ninth Circuit opinions in the eighteen years between its issuance in 1959 and *Data Disc* in 1977, *Data Disc*'s formulation of the same test was cited twenty-six times by published Ninth Circuit appellate decisions, and twenty-six times by published Ninth Circuit district court opinions, in the ten years after *Data Disc* was issued. In addition, many additional cases cited cases which cited *Data Disc*—only amplifying *Data Disc*'s powerful precedential impact (last searched Mar. 3, 2007).

18. *See, e.g.*, Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006) (citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)).

19. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1205–06 (9th Cir. 2006) (en banc) (Fletcher, J.) (citing Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Lake*, 817 F.2d at 1421). *Schwarzenegger* is a landmark personal jurisdiction case, discussed at length *infra* Part I.A.3. The Lexis database shows that *Schwarzenegger*'s use of the *Lake* formulation has been cited sixty-two times, including fifty-six times by Ninth Circuit district courts, in the thirty-three months after *Schwarzenegger* was issued (last searched Mar. 14, 2007). Interestingly, *Yahoo!* and *Schwarzenegger* are illustrations of how influential Judge William A. Fletcher's views on personal jurisdiction have been in the Ninth Circuit since acceding to the bench in 1999. A former law professor, Judge Fletcher authored the opinion for the en banc court in *Yahoo!*, the panel decision in *Schwarzenegger*, and a Ninth Circuit personal jurisdiction decision, *Dole Food*

> (1) [T]he nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.[20]

The *Lake v. Lake* test is—as is obvious on its face—a reformulation of the *Data Disc* test. The tests differ only in the initial, dependent clause of its initial prong. The *Data Disc* test begins, "[t]he nonresident defendant must do some act or consummate some transaction with the forum."[21] The *Lake v. Lake* test begins, "[t]he nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof."[22] Otherwise, the tests are identical.[23]

The *Lake* court reformulated the *Data Disc* test, without explicitly stating it was doing so. The *Lake* opinion, together with several other decisions at the time, represent the Ninth Circuit's attempt to modify its specific jurisdiction law to incorporate recent Supreme Court decisions which appeared to broaden the purposeful availment concept first articulated by the Supreme Court in *Hanson v. Denckla*[24]—notably *Burger King* with its purposeful direction language,[25] and *Calder v. Jones* with its effects test.[26] However, the Ninth Circuit was not entirely clear that it was in fact re-formulating the first prong of the specific jurisdiction test, let alone did it explain how it was doing so.

2. *The History of the Ninth Circuit's Specific Jurisdiction Test*

a. International Shoe, McGee v. International Life Insurance Co., *and* Hanson v. Denckla

The Ninth Circuit's test for specific jurisdiction first appeared in 1959,[27] almost two decades before *Data Disc*. The test was the Ninth

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Co. v. Watts, 303 F.3d 1104 (9th Cir. 2003), and sat on the panel in *CE Distribution, LLC v. New Sensor Corp.*, 380 F.3d 1107 (9th Cir. 2004). Judge Fletcher also wrote the Ninth Circuit opinion which adopted pendent personal jurisdiction, *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1181 (9th Cir. 2004), which permits district court judges, at their discretion, to hear otherwise jurisdictionally insufficient claims.

20. Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987).

21. *Data Disc*, 527 F.2d at 1287.

22. *Lake*, 817 F.2d at 1421.

23. While the *Lake v. Lake* formulation of the first prong includes a "purposeful direction" element to the "purposeful availment" language of *Data Disc*, most Ninth Circuit opinions continue to characterize the first prong as the "purposeful availment" prong. Without exceptional care in the explanation (such as that proffered by Judge William A. Fletcher in *Schwarzenegger*), this makes for confusing reading, and, at times, confusing analysis as well. This will be discussed *infra* Part I.A.3.

24. *See* 357 U.S. 235 (1985).

25. *See* 471 U.S. 462, 473 (1985).

26. *See* 465 U.S. 783, 787 (1984).

27. L. D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 773, 779 (9th Cir. 1959).

Circuit's response to three Supreme Court decisions[28] from the mid-1940s through the late 1950s which revolutionized, and re-characterized, personal jurisdiction law.

All discussion of modern personal jurisdiction law begins, inevitably, with *International Shoe* in 1945.[29] There, the Court addressed the increasing inability of traditional territorial jurisdiction, even with its various exceptions, to adequately reflect the increasing integration and complexity of national economic enterprise, communications, and social relationships.[30] In *International Shoe*, the Court declared that

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[31]

International Shoe was followed a dozen years later by what is still perhaps the Supreme Court's boldest holding of jurisdiction over a non-resident defendant.[32] In *McGee v. International Life Insurance Co.*, the Court upheld jurisdiction over a Texas-based insurer whose only connection with California was the single policy held by the insured.[33] While the Court recognized that "the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries,"[34] it adopted a strongly plaintiff-friendly position in finding personal jurisdiction based on that single contact.[35]

The following year, the Supreme Court saw fit to limit—in some ways sharply—the expansive view of state jurisdiction over non-resident defendants suggested in *International Shoe* and *McGee*. In *Hanson v.*

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28. *See* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

29. *Cf.* S. Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 380 (6th Cir. 1968) ("[I]n [*International Shoe*], the United States Supreme Court broke with the past and established a new test." (citation omitted)).

30. *See Int'l Shoe*, 326 U.S. at 313–14. International Shoe, a corporation based in Missouri, and selling shoes in Washington state, had elaborately structured its operations to avoid liability for employment-related taxes in Washington. *Id.* (describing the company's operations in Washington). According to the traditional model of territorial jurisdiction, and its various exceptions, International Shoe was not subject to the jurisdiction of the Washington state courts. The Court noted the striking anomaly of a corporation, which had between eleven and thirteen salespersons selling shoes in the state, but which, according to the then-current case law, was not jurisdictionally "present" in the state. *Id.* That Court addressed that anomaly by changing—and revolutionizing—the law. *Id.* at 322.

31. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

32. *See* Dollar Sav. Bank v. First Sec. Bank, 746 F.2d 208, 212 (3d Cir. 1984) ("In *McGee* the Court applied its most relaxed standard of contacts—one which it has steadfastly declined to extend.").

33. 355 U.S. 220, 223 (1957).

34. *Id.* at 222.

35. *Id.* at 223.

Denckla,[36] the Court made clear that the minimum contacts inquiry was a meaningful limit on the jurisdiction of state courts over non-resident defendants—that *International Shoe* and *McGee* did not "herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts."[37] *Denckla* was a close, five to four decision, and the dissents show that the Court had viable grounds for deciding the case differently than it did.[38] As much as anything else, however, the Court's decision in *Denckla* exemplifies a dynamic which characterizes all personal jurisdiction jurisprudence: the tension between expansive views of permissible personal jurisdiction, and restrictive ones.

Denckla's doctrinal legacy comes from a single, short passage in the majority's opinion:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[39]

While in this passage the Court cites *International Shoe*,[40] it also injects three essentially new concepts to the Supreme Court's personal jurisdiction jurisprudence. First, personal jurisdiction must be traceable to purposeful action of the non-resident defendant, and not simply to the unilateral activity of either a third party or the plaintiff. Second, how the purposeful action rule will be applied will vary with the quality and nature of the defendant's activity. And, third, the defendant must "avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[41]

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36. 357 U.S. 235 (1958).

37. *Id.* at 251.

38. *Denckla* involved complicated questions of state probate and trust law, and also questions of whether the jurisdiction asked for was *in rem* or *in personam*. *See Denckla*, 357 U.S. at 256–57 (Black, J., dissenting). Hence, there were alternative grounds for deciding the case.

39. *Id.* at 253 (majority opinion). The doctrinal centrality of these propositions is evident from an even cursory review of personal jurisdiction law, and shows up in quantitative measures as well. These two sentences, in whole or in part, have been directly cited 4,320 times, according to Lexis. All the other propositions from the *Denckla* opinion have been directly cited only 684 times between them (last searched Mar. 18, 2007).

40. The actual text of *International Shoe* that the *Denckla* opinion cites is as follows:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

41. *Denckla*, 357 U.S. at 253. Each of these three *Denckla*-originated premises of personal jurisdiction law remain canonical personal jurisdiction law. The purposeful availment requirement, however, while still very much the law—at least within the broad context of "doing business with"

b. Four Georgetown Law Students and L. D. Reeder

International Shoe, *McGee*, and *Denckla* together suggested that there had been a revolutionary development in personal jurisdiction law[42]—a development that had not yet been fully characterized or reduced to rules or propositions courts could apply. Four students, authoring a note in the Georgetown University Law Review months after the *Denckla* decision, appear to have been the first to summarize and explain what the Supreme Court had done in the form of a doctrinal test.[43]

The students' note identified the problem presented by *International Shoe*, *McGee*, and *Denckla*:

> Considered alone, *McGee* would seem to represent the ultimate in the expansion of the *International Shoe* doctrine of "minimum contacts" with a state, and as such it might be susceptible to criticism as too broad a rule, which could easily create undue hardships for nonresident defendants. However, the sweeping language of Mr. Justice Black in *McGee* was tempered by the more explicit opinion of Mr. Chief Justice Warren in a case decided later in the same term, *Hanson v. Denckla*.[44]

After a discussion of the specific principles of *International Shoe*, *McGee* and *Denckla*, the students boldly claimed: "There are three rules which can be drawn from a combined reading of *International Shoe*, *McGee* and *Hanson* against which all future litigation of a like nature may be tested."[45] The students' note went on to set forth the three-prong test for specific jurisdiction later incarnated in the *Data Disc* test.[46] The Ninth

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cases—consciously reflects, and is limited by, the commercial context from which it (and *International Shoe* and *McGee*) arose. Neither the Supreme Court, nor any of the federal circuit courts, have fully explained and characterized how the purposeful availment limitation on personal jurisdiction can best be understood and applied in contexts outside of the "doing business with" class of cases. This has led to a great deal of doctrinal confusion, and inconsistency among the lower courts.

42. *See* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the* In Personam *Jurisdiction of State Courts—From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 623 (1958) ("The cases from *International Shoe* to *Denckla* reveal that although old dogma has been destroyed new doctrine to replace it has not been firmly fashioned. The language of 'reasonableness' and 'fair play' to which the Court has resorted is rather a statement of a conclusion than a reason. The nationalization of American society has been reflected in the trend toward greater power of the states over defendants who neither owe them 'allegiance' nor are subject to their physical power. But *Denckla* . . . reveal[s] that the concept of territorial limitations on state power is still a vital one.").

43. *See* Bert Harte et al., Note, *Jurisdiction over Nonresident Corporations Based on a Single Act: A New Sole for* International Shoe, 47 GEO. L.J. 342 (1959). Although their contribution is unrecognized today, Bret Harte, G. Gervaise Davis III, John M. Kelleher, and Mary Catharine Ostmann developed the test for specific jurisdiction used not only in the Ninth Circuit, but in several other circuits and many states as well. *See id.* at 351–52, 373.

44. *Id.* at 344.

45. *Id.* at 351.

46. The test reads as follows:

> There are three rules which can be drawn from a combined reading of *International Shoe*, *McGee* and *Hanson* against which all future litigation of a like nature may be tested. . . .

Circuit first cited the test (and the students' note) in the 1959 case, *L.D. Reeder Contractors v. Higgins Indus. Inc.*[47]

c. Data Disc

Data Disc, Inc. v. Systems Technology Associates, Inc.[48] was at the time, and remains, a landmark case in Ninth Circuit personal jurisdiction law.[49] In *Data Disc*, plaintiff Data Disc, a California-based subcontractor, filed suit in the federal district court of Northern California, alleging breach of contract and various business torts against defendant Systems Technology Associates (STA).[50] The claims arose in the context of Data Disc's subcontract under STA's contract with the National Aeronautics and Space Administration (NASA).[51] In an elegant and well-reasoned opinion, Judge Wallace, writing for the court, summarized and further developed the procedural law applicable to personal jurisdiction challenges. He then stated—as the law in the circuit—the *L. D. Reeder* three-prong test for specific jurisdiction.[52] Applying the test to the facts of the case, the appellate court found personal jurisdiction over both the contract and tort claims, reversing the trial court.[53]

d. The Limits of an "Availment" Basis for Jurisdictional Contacts

The *Data Disc* formulation of the first prong of the specific

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(1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.

(2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a "substantial minimum contact."

(3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of "fair play" and "substantial justice." If this test is fulfilled, there exists a "substantial minimum contact" between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens.

Id. at 351–52 (footnotes omitted). The Ninth Circuit soon thereafter reproduced the students' test in its entirety. *See* L. D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 773 & n.12 (9th Cir. 1959).

47. *See* discussion *supra* note 17.

48. 557 F.2d 1280 (9th Cir. 1977).

49. Not only did *Data Disc* firmly establish the three-prong test for specific jurisdiction as the law in the Ninth Circuit, but it also was foundational in the procedural evaluation of a personal jurisdiction challenge. *See, e.g.*, Kyle v. Cont'l Capital Corp., 575 F. Supp. 616, 619 (E.D. Pa. 1983) (citing *Data Disc*, 557 F.2d at 1284–86, for its "graduated burden of proof on the issue of jurisdiction against which the sufficiency of a plaintiff's evidence may be measured at various stages in the development of the factual record").

50. *Data Disc*, 557 F.2d at 1283.

51. *Id.*

52. *Id.* at 1287.

53. *Id.* at 1288–90.

jurisdiction test[54] reflects the commercial context of *International Shoe*, *McGee*, and *Denckla*—the three Supreme Court opinions which were the source of the test. This "purposeful availment" formulation continues to accurately state the law with respect to jurisdictionally relevant contacts when the cause of action results from an entity or individual's commercial dealings with residents of the forum state. Stated as a limitation, the defendant must engage in purposeful action with respect to the forum. The defendant can choose to act or not act, balancing the benefits of interaction with the forum with the costs which may result from his being subject to suit in the forum. That is, a nonresident defendant may be called to answer for his purposeful actions in commercial dealings which result in injury to another, in the place convenient for the plaintiff and efficient for the legal system. However, jurisdiction will only be allowed where the defendant's purposeful actions involved sufficient contact with the forum that the defendant should have known—and where it would be just—that he would be subject to suit in the forum.

While these principles were fully evident in *International Shoe*, *McGee*, and *Denckla*—hence their doctrinal expression in the *Data Disc* test—their meaning was developed further in later Supreme Court opinions, notably *World-Wide Volkswagen v. Woodson*,[55] and, most importantly, in *Burger King Corp. v. Rudzewicz*.[56]

e. Burger King Corp. v. Rudzewicz *and "Purposeful Direction"*

The jurisdictional issue in *Burger King*, like that in *International Shoe*, *McGee*, and *Denckla*, arose in the context of the defendants' interstate commercial dealings. In *Burger King*, the Michigan defendant purposefully established a franchisee relationship with the Florida-based

54. *Id.* at 1287 ("The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.").

55. 444 U.S. 286 (1980).

56. 471 U.S. 462 (1985). In oft-cited, doctrinally-central passages from *Burger King*, Justice Brennan for the Court outlined the following principles with respect to purposeful availment:

> "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation . . . "the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."

Id. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 297 (1980)). Rather, the defendant's action with respect to the forum state which subjects him to jurisdiction in the forum must be purposeful. *See id.* at 474–75 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Id.* at 475 (citations omitted).

franchiser.[57] Like the defendants in *International Shoe* and *McGee*, and unlike the defendant in *Denckla*, the Court found that the defendants availed themselves of the privileges of doing business with a resident of the forum state—and in the process of doing so, had made jurisdictionally relevant contacts with the forum state.[58] The defendants made these contacts as the result of purposeful action by which they should have reasonably anticipated the likelihood of facing suit in the forum.[59]

However, the Court in *Burger King* added a new element to the purposeful availment analysis—still in language specifically referring to the commercial context of the case at hand. The defendants' jurisdictionally relevant contacts with the forum would not only include those contacts which resulted from their availment of the privilege of doing business with the forum state. In addition, the defendants' jurisdictionally relevant contacts with the forum might also include those actions by which it *directed* its activities towards the forum state or its residents—regardless of whether those directed activities resulted in physical contacts with the state:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.[60]

The Court undoubtedly found this "purposeful direction" concept useful due to the paucity of the defendants' physical contacts with the forum state in the case at hand.[61] More importantly doctrinally, the Court's "purposeful direction" principle arose from a Supreme Court case from the prior year which it cited for the "purposeful direction" proposition.

f. Calder v. Jones *and the Effects Test*

In *Calder v. Jones*,[62] the Supreme Court applied the minimum

57. *Id.* at 466–67.

58. *See id.* at 478–80.

59. *Id.*

60. *Id.* at 476.

61. The Michigan franchisee had had very few physical contacts with the Florida-based franchisor, as most of its dealings with the Burger King Corporation had been through Burger King's regional management located in Michigan. *See id.* at 466–67.

62. 465 U.S. 783 (1984).

contacts doctrine of personal jurisdiction in the torts arena.[63] In order to do so, the Court in *Calder* modified, and extended, the minimum contacts doctrine. This modification and extension of the first prong of the specific jurisdiction inquiry, has been alternatively characterized as "purposeful direction" (at its most general and abstract), or, in its specific application, as the "effects test."

In *Calder*, the plaintiff, a television and movie star who lived and worked in California, filed suit in California against the Florida-based editor and writer of an article published in a nationally distributed magazine.[64] The article, she alleged, made libelous statements about her, caused her emotional harm, and damaged her reputation and business prospects within the entertainment industry.[65]

The publisher was found to have jurisdictionally relevant contacts based on circulation of the magazine in California—hence on an availment theory.[66] The editor and director, however, did not have sufficient contacts with California which would enable a court to find jurisdiction under an availment theory.[67] However, the California appellate court, under a California doctrine of personal jurisdiction that permitted jurisdiction to be found based on a defendant's actions outside of the forum which caused effects inside the forum,[68] found jurisdiction over the editor and writer.[69] The Supreme Court affirmed the finding of personal jurisdiction.[70]

Calder, a short opinion taking up only nine pages in the U.S. Reports, was not clear in establishing which specific factual circumstances the Court found necessary to its holding in the case itself, nor did the Court explain the new test it set forth. As a result, lower courts have found application of *Calder* "confusing from the start,"[71] and "difficult to interpret in subsequent cases."[72] As one scholar put it, *Calder*

63. *Calder* involved the intentional tort of libel. *See id.* at 784.

64. *See id.* at 784–85.

65. *See id.* at 788–89.

66. *Id.* at 791.

67. *See id.* at 789.

68. *See, e.g.*, Secrest Mach. Corp. v. Superior Court, 660 P.2d 399, 402 (Cal. 1983) ("California has recognized that a state may exercise jurisdiction over one who causes effects in the state by an act or omission done elsewhere with respect to causes of action arising from the effects. This is so unless the nature of the effects and of the individual's relationship to the state make exercise of jurisdiction unreasonable."); *see also* Forsythe v. Overmyer, 576 F.2d 779, 782 n.5 (9th Cir. 1978) ("Courts have recognized that under California's longarm statute and the due process clause, a defendant may be subject to California jurisdiction when he has caused an effect in that state by an act or omission elsewhere.").

69. *Calder*, 465 U.S. at 787.

70. *Id.* at 791.

71. Halaby, *supra* note 11, at 630.

72. C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J.

"has proved to be a can of worms."[73] The primary difficulty with *Calder* is that while the Court made clear that the nonresident defendant must purposefully act to cause effects in the forum state, it provided conflicting and minimal guidance as to what sort of "express aiming"[74] was necessary to be considered a jurisdictionally relevant contact.[75] What the Court did firmly establish, however, was "a new conception of 'purposeful contacts.' It is this new conception of purposefulness that makes *Calder* important."[76]

g. Haisten v. Grass Valley Medical Reimbursement Fund

As noted above, *Burger King* and *Calder* indicated to lower courts that the Supreme Court had extended personal jurisdiction doctrine in significant ways. In *Haisten*, one of the Ninth Circuit's more important personal jurisdiction cases, the court addressed the issue squarely:

> [R]ecent Supreme Court cases indicate that modification of our three-prong test is appropriate. In particular, within the rubric of "purposeful availment" the Court has allowed the exercise of jurisdiction over a defendant whose only "contact" with the forum state is the "purposeful direction" of a *foreign* act having *effect* in the forum state.[77]

Haisten's facts illustrate the need for extending the concept of purposeful contacts to include more than those contacts typically associated with an individual or corporation engaging in commercial activity with the forum state. In *Haisten*, the defendant, a self-funding indemnity insurance fund, "did everything 'humanly possible' to avoid the benefits and protection of California's laws."[78] A group of twenty-two California physicians had organized the Fund as a corporation in the Cayman Islands.[79] All contracts were signed, all payments were received, and all Fund activities took place in the Cayman Islands.[80] The court noted the obvious fact, however, that the "sum and substance of the Fund's transactions [were] to insure California doctors against loss from medical malpractice exclusively in California,"[81] and that the purpose of the Fund's elaborate scheme of avoiding contacts with California was to

601, 611 (2006).

73. Condlin, *supra* note 7, at 91.

74. The Court distinguished between "mere untargeted negligence" and purposeful action, but did not then define the sort of purposeful action and what sorts of effects would be necessary. *Calder*, 465 U.S. at 789 ("[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California.").

75. *See* Condlin, *supra* note 7, at 94 ("The difficulty with the test, however, is that it has proved difficult to give the concept of targeting a precise meaning.").

76. *Id.* at 92.

77. Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986).

78. *Id.*

79. *Id.* at 1395.

80. *Id.*

81. *Id.* at 1400.

avoid the reach of California's insurance regulations.[82] While the Fund lacked the contacts with California necessary under the "availing" standard of jurisdictionally relevant contacts, the court found jurisdiction over the Fund based on the Supreme Court's extension of personal jurisdiction doctrine in *Burger King* and *Calder*.[83]

h. Lake v. Lake

What the *Haisten* court did not do, though, was modify the Ninth Circuit's specific jurisdiction test to incorporate "purposeful direction" of actions outside the state which had effects inside the state. It was the next major case to apply the purposeful direction doctrine which did so.

In *Lake v. Lake*, the defendant attorney had secured an ex parte custody order on behalf of a child's mother in California.[84] Plaintiff father alleged that defendant attorney knew that the California court would not have issued the ex parte custody order enabling the mother to remove custody of the child from the plaintiff father in Idaho, had the California courts known all of the legally relevant facts.[85] The only jurisdictionally relevant contact in determining whether jurisdiction over the defendant attorney was proper in Idaho was his purposeful (and allegedly tortious) act within California intended to have effects in Idaho.[86] Citing *Calder*, the court found jurisdiction proper: "Under the intentional direction analysis, [defendant attorney] intended a foreign act, obtaining the California ex parte order, to have an effect in the forum state of Idaho."[87]

As noted earlier in Part II.A.1, the court in *Lake* added a purposeful direction clause to prong one of the *Data Disc* specific jurisdiction test:

> [*T*]*he nonresident defendant must purposefully direct his activities* or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.[88]

What the *Lake* court did not do, though, was explain how purposeful direction analysis would be conducted in a given case, nor did it explain the relationship between purposeful direction and purposeful availment. In fact, the court in its analysis engaged in a confusing conflation of purposeful availment language while applying the purposeful direction

82. *Id.* at 1395 ("By this elaborate structure, the Fund deliberately intended to avoid California insurance regulations, while at the same time, providing physicians at the Hospital with malpractice insurance.").

83. *Id.* at 1398 ("We look toward the economic reality of the Fund's activities and conclude that the Fund 'purposefully directed' its commercial efforts toward California residents.").

84. 817 F.2d 1416, 1419 (9th Cir. 1987).

85. *Id.*

86. *Id.* at 1423.

87. *Id.*

88. *Id.* at 1421 (emphasis added).

test:

> The first step of the specific jurisdiction analysis involves a qualitative evaluation of the defendant's contact with the forum state. Specifically, we look for "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[89]

This conflating of purposeful availment language with purposeful direction analysis has been repeated numerous times in Ninth Circuit personal jurisdiction cases.

3. One Test, Not Two: Schwarzenegger v. Fred Martin Motor Co.

While it's beyond the scope of discussion here to trace the various ways the Ninth Circuit has dealt with (or ignored) the existence of two different modes of finding jurisdictionally relevant contacts, it appears that the Ninth Circuit finally in 2004 established clearly that there is a distinction between the two—one which should be reflected in the analysis of the first prong. In *Schwarzenegger v. Fred Martin Motor Co.*, a major case in personal jurisdiction law, Judge William A. Fletcher explained:

> We often use the phrase "purposeful availment," in shorthand fashion, to include both purposeful availment and purposeful direction, but availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort.[90]

Despite *Schwarzenegger*, though, district courts and Ninth Circuit panels still frequently cite the *Data Disc* formulation of the Ninth Circuit's specific jurisdiction test rather than the *Lake* formulation,[91] and continue to use purposeful availment language in analyzing purposeful direction contacts (albeit less frequently after *Schwarzenegger* and its exceptionally clear statement of the distinction between the two modes of analysis).[92]

It is doctrinally correct for Ninth Circuit panels and district courts to use the *Lake* formulation for specific jurisdiction rather than the *Data*

89. 817 F.2d at 1421 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

90. 374 F.3d 797, 802 (9th Cir. 2004) (citations omitted). Judge Fletcher's conclusion was based on his informed assessment of Ninth Circuit case law, which suggested that a number of prior panels had implicitly or explicitly identified a distinction between the availment and direction inquiries. For example, Judge Fletcher cited *Ziegler v. Indian River County*, which pointed out that "[a]lthough there is some disagreement on the issue, we apply different purposeful availment tests to contract and tort cases." 64 F.3d 470, 473 (9th Cir. 1995).

91. *See, e.g.*, Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1156 (9th Cir. 2006).

92. A pre-*Schwarzenegger* case which illustrates this mode of analysis is *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir. 2000). *See* Floyd & Baradaran-Robison, *supra* note 72, at 622–23 ("Other courts similarly have regarded *Calder* as synonymous with the purposeful availment requirement of *Burger King*. For example, in *Bancroft & Masters, Inc. v. Augusta National Inc.*, . . . the Ninth Circuit used the two concepts interchangeably in applying the *Calder* effects test.").

Disc formulation (and has been, really, for the past twenty years). Further, Ninth Circuit panels and district courts are well advised to follow Judge Fletcher's clear example in *Schwarzenegger* in distinguishing that there are two modes of analysis for jurisdictionally relevant contacts.[93]

Eventually, an integrated view of jurisdictionally relevant contacts which incorporates and explains both availment and direction is doctrinally necessary. The Ninth Circuit might reasonably offer such a formulation if an opportunity to do so presents itself. Ultimately, the Supreme Court must provide such guidance to all lower courts.[94]

B. THE NINTH CIRCUIT'S SPECIFIC JURISDICTION TEST IN PRACTICE

The Ninth Circuit's specific jurisdiction test cited above is a three-prong test. Each of the prongs—at least nominally—has independent significance and weight.[95] Each has an interesting doctrinal history, and raises questions of policy and theory which have been extensively discussed in case law and in legal scholarship. Each prong, at least in theory, interacts with the others[96]—and in a given case, can be determinative. However, as will be discussed further in Part III.B.3, the vast majority of Ninth Circuit jurisdiction decisions turn on the analysis in the first prong.

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93. This is despite the ongoing possibilities for confusion in referring to the first prong of the specific jurisdiction test as "purposeful availment," which itself includes both "purposeful availment" and "purposeful direction."

94. At best, the Supreme Court would articulate a broader principle for what constitutes jurisdictionally relevant contacts. Such a principle would incorporate both purposeful availment (contacts within the forum state which usually, but not exclusively, arise in interstate commercial contexts) and also purposeful direction (those actions a defendant takes outside of the forum which are not direct contacts with the forum, but whose effect in the forum nonetheless is relevant to whether the defendant should be subject to suit in the forum). Short of such a "unified field theory" of jurisdictionally relevant defendant conduct, it would also be helpful to lower courts if the Court would provide further characterization of the meaning of availing and directing conduct on the part of a defendant, as well as an exploration of how each is relevant in various causes of action and factual contexts, and how a court should evaluate a defendant's respective availing and directing conduct in a given case.

95. A number of Ninth Circuit opinions might be read to suggest that each prong no longer has independent weight. *See, e.g.*, Ochoa v. J.B. Martin & Sons Farms, Inc., 287 F.3d 1182, 1189 n.2 (9th Cir. 2002) ("Although Ninth Circuit law formerly required a plaintiff to demonstrate each of these three factors to establish specific jurisdiction, this court has, in light of subsequent Supreme Court precedent, adopted a more 'flexible approach.' Jurisdiction may be established with a lesser showing of minimum contacts 'if considerations of reasonableness dictate.'" (citations omitted)). However, the *Ochoa* court and the cases it cites are talking of the relationship between, and permissible balancing of, the three prongs—an entirely different issue than whether each prong has independent significance in the specific jurisdiction inquiry.

96. See, for example, Judge Fletcher's discussion of the relationship between the purposeful availment/direction prong and the "arising out of" prong in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1206–07 (9th Cir. 2006).

1. Purposeful Availment/Purposeful Direction

As noted previously in Part I.A.2.d, the law of what sort of "doing business with" contacts are jurisdictionally relevant is relatively well developed in the Ninth Circuit, as modern personal jurisdiction law originated in the context of interstate business enterprise and activities. Other than in passing, that law won't be addressed here.[97]

By contrast, the law of what sort of actions directed at (but not in or with the forum) are jurisdictionally relevant, is doctrinally in confusion. Also in confusion is the relationship between the availing and directing contacts, theoretically, analytically, and practically—both in the Ninth Circuit, as well as in the other federal circuits, and the states. While *Burger King* must be consulted to fully understand what the Supreme Court has said to date with respect to purposefully directed contacts, the bulk of the case law on purposeful direction is an interpretation of *Calder v. Jones* and the effects test it spawned.[98]

a. The Effects Test

Calder has been interpreted frequently by the Ninth Circuit,[99] and as a result, the Ninth Circuit has the broadest effects-test case law among the federal circuit courts.[100] While there are scholars who purport to find a consistent trend in Ninth Circuit cases interpreting *Calder* and the effects test,[101] it is more accurate to say that the Ninth Circuit is inconsistent in both its rationale and its holdings.[102]

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97. This is simply due to the limits of time and scope. This case law is wonderfully rich, with a great deal of *de facto* common law ripe for "restatement" as well as numerous open and unresolved issues. One example, of several, is that of attribution of contacts.

98. *See supra* Part II.A.2.f.

99. A rough proxy for the Ninth Circuit's relative position among the thirteen federal circuits is that, of the ninety-nine published federal appellate cases which come up in a Lexis search of "Calder & Jones & effects & 'personal jurisdiction,'" just over 30% (thirty) of those are Ninth Circuit cases. No other federal circuit has more than twelve.

100. *See, e.g.*, Kowalski v. Integral Seafood LLC, No. 06-00182 BMK, 2006 U.S. Dist. LEXIS 83036, at *4 (D. Haw. Nov. 14, 2006) ("Some circuits have created an 'effects' test to determine whether specific jurisdiction exists under *Calder*. The Ninth Circuit has the most highly developed of these tests.").

101. *See, e.g.*, Scott Fruehwald, *The Boundary of Personal Jurisdiction: The "Effects Test" and the Protection of Crazy Horse's Name*, 38 J. MARSHALL L. REV. 381, 400 (2004) ("Lower courts have differed in their interpretations of *Calder*, with the Eighth and Ninth Circuits usually applying it broadly and the Third Circuit narrowly.").

102. *See* Floyd & Baradaran-Robison, *supra* note 72, at 617 ("Sometimes, the same court has applied differing tests to circumstances that seem factually indistinguishable. This problem is illustrated by *Bancroft & Masters, Inc. v. Augusta National, Inc.* and *Cybersell, Inc. v. Cybersell, Inc.*, two Ninth Circuit trademark infringement cases with similar facts. One decision applied *Calder* to sustain the exercise of jurisdiction while the other explicitly refused to apply *Calder* and applied *Zippo* instead in rejecting jurisdiction." (citations omitted)). For extended discussions—and at times sharp criticisms—of Ninth Circuit effects-test case law, see generally Halaby, *supra* note 11, and A. Benjamin Spencer, *Terminating* Calder*: "Effects" Based Jurisdiction in the Ninth Circuit After* Schwarzenegger v. Fred Martin Motor Co., 26 WHITTIER L. REV. 197 (2004). District courts also struggle with the seemingly inconsistent Ninth Circuit effects-test precedent. It is hard not to

i. Paccar International *and* Core-Vent Corporation

The first major Ninth Circuit case to apply *Calder* in a significant manner was *Paccar International* in 1985.[103] *Paccar* cited *Calder* for its broad holding that an intentional tort committed outside the forum with effects inside the forum was sufficient for jurisdiction in the forum state, stating that "[a] tortious act, standing alone, can satisfy all three requirements under *Data Disc* if the act is aimed at a resident of the state or has effects in the state."[104] While Ninth Circuit holdings and rationale have swung, at times inexplicably, between strict and more liberal applications of the effects test since *Paccar International*, none have come close to its sweeping statement as to the breadth of the effects test. All Ninth Circuit panels since have either explicitly or implicitly agreed that *Calder's* facts place sharp limitations on the liberality with which the effects test can be used to establish jurisdiction over a nonresident defendant with no other contacts than the acts which caused effects in the forum.[105]

The Ninth Circuit first formalized its effects test in 1993, in *Core-Vent Corp. v. Nobel Industries AB.*[106] Reviewing the text and facts of *Calder*—which wasn't explicit on which elements are essential to find jurisdiction via effects-based contacts—the *Core-Vent* court purported to find that Calder "established that personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state."[107] While the test has remained constant over the subsequent years, the Ninth Circuit has had trouble in reaching consistent rationale and interpretations of each element.

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sympathize with the judge who pointed out that the holdings of *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997), and *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004), were inconsistent and unreconciled, and would lead to different results when applied to the facts of the instant case. *See* Brayton Purcell LLP v. Recordon & Recordon, 361 F. Supp. 2d 1135, 1141–42 (N.D. Cal. 2005) ("[O]ne could conclude that *Columbia Pictures* and *Schwarzenegger* are not entirely consistent.").

103. Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K., 757 F.2d 1058, 1064 (9th Cir. 1985).

104. *Id.*

105. Thus, by implicitly or explicitly so holding and doing so consistently, the Ninth Circuit is in effect agreeing with the Third Circuit, which has perhaps applied the effects test the most stringently among the federal circuits:

> We recognize that a conservative reading of *Calder* may significantly limit the types of [cases] that will satisfy the requirements of personal jurisdiction via the "effects test." Yet, we believe that such a result is consistent with the Supreme Court's intended relationship between *Calder* and the traditional minimum contacts analysis.

IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998).

106. 11 F.3d 1482 (9th Cir. 1993).

107. *Id.* at 1486.

ii. The Effects Test, Element by Element

Intentional Act Prong

Two main issues have arisen in prong one of the effects test in Ninth Circuit cases. The first is how broadly does the intentional act sweep? Is it limited to intentional torts, and if so, to certain types? Judge Fletcher, writing for the majority of a divided en banc court in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisime*,[108] provided some answers to these questions. *Yahoo!* held that in evaluating jurisdictionally relevant intentional acts having effects in the forum, it was not only unnecessary for those acts to be intentional torts—it was not necessary they be wrongful acts at all.[109]

The other issue which appears to bedevil Ninth Circuit analyses of the first prong of the effects test is how to characterize the intentional act requirement—and its relationship to the express aiming requirement. For example, Judge Fletcher, again writing for the court, this time in *Schwarzenegger v. Fred Martin Motor Co.*, held that "'[i]ntentional act' has a specialized meaning in the context of the *Calder* effects test."[110] In *Schwarzenegger*, an Ohio-based automobile dealership used movie actor Arnold Schwarzenegger's likeness in a series of newspaper advertisements that ran only in Akron, Ohio.[111] The dealership acted knowingly in using Schwarzenegger's likeness without permission—and in doing so arguably violated Schwarzenegger's right of publicity, causing injury to Schwarzenegger's "hard earned reputation as a major motion picture star."[112] Notwithstanding the defendant's knowing (e.g., intentional) use of the plaintiff's likeness without permission, the court did not find that the dealership's intentional act was misappropriating Schwarzenegger's likeness. Rather, the dealership's intentional act was "the creation and publication of the Advertisement," which only ran in Ohio.[113] Based on this analysis, the court found no intentional act which was expressly aimed at California.[114] The court's holding that there was no intentional act expressly aimed at California has been sharply criticized in the academic literature.[115]

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108. 433 F.3d 1199 (9th Cir. 2006).

109. *Id.* at 1207 ("In any personal jurisdiction case we must evaluate all of a defendant's contacts with the forum state, whether or not those contacts involve wrongful activity by the defendant."). The majority's holding in this respect was sharply criticized by both concurring opinions. *See, e.g.*, *id.* at 1230 (O'Scannlain, J., concurring in the judgment) ("[The majority's] conclusion is undermined by the language of *Calder* itself and requires the majority to divorce that case's holding from its fact [sic]—always a dubious exercise.").

110. 374 F.3d 797, 806 (9th Cir. 2004).

111. *Id.* at 799–800.

112. *Id.* at 800.

113. *Id.* at 800, 807.

114. *Id.* at 807.

115. The best explanation for why the case's rationale is ultimately unsatisfying comes from A.

Express Aiming Prong

The Ninth Circuit has consistently found that for the effects test to be met, the defendant must "expressly aim" or target his acts to the forum state. The express aiming element is related to the court's consistent principle that there must be some limiting factor to effects-test jurisdiction.[116] The court in *Bancroft & Masters, Inc. v. Augusta National Inc.*[117] pointed out that the Ninth Circuit has

> struggled somewhat with *Calder*'s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be "something more," but have not spelled out what that something more must be.[118]

The *Bancroft & Masters* court then proceeded to provide that answer: "something more" meant "express aiming."[119]

Saying the limiting factor to the effects test must be "express aiming" provided little, if any explanatory and analytical power, because, as the *Bancroft & Masters* court correctly noted, "[e]xpress aiming is a concept that in the jurisdictional context hardly defines itself."[120] The court has not provided any subsequent, meaningful guidance as to what "express aiming" and its synonym, "targeting" mean in the context of the effects test inquiry. The cases applying the concept seem to assume their conclusion (e.g., there was or was not express aiming), with very little in the way of consistent principles applied from case to case.

Benjamin Spencer:

> Although it was the "express aiming" prong of the test that the *Schwarzenegger* court found to be unsatisfied, it was ultimately the court's improper identification of the relevant intentional act that resulted in its erroneous conclusion that there was no express aiming such as would render Fred Martin amenable to jurisdiction in California. The intentional acts of concern under *Calder* are the "allegedly [tortious] actions" of the defendant that give rise to the claim being prosecuted by the plaintiff.

Spencer, *supra* note 102, at 216 (citations omitted). That is, the intentional act in *Schwarzenegger* was not solely the publication of an advertisement in an Akron newspaper. The jurisdictionally-relevant intentional act arguably also included the knowing appropriation, without permission, of an actor's likeness in that advertisement.

116. Judge O'Scannlain's concurrence in *Yahoo!* exemplifies a concern which underlies all of the Ninth Circuit's effects test cases. That is, a rule permitting personal jurisdiction based only the effects of the defendant's actions outside the forum which are felt by the plaintiff inside the forum, risks allowing almost unlimited exposure to suit in the forum state. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1293 (9th Cir. 2006) (O'Scannlain, J., concurring in the judgment) ("The Supreme Court has never approved such a radical extension of personal jurisdiction as would sanction the majority's holding that, by litigating a bona fide claim in a foreign court and receiving a favorable judgment, a foreign party automatically assents to being haled into court in the other litigant's home forum.").

117. 223 F.3d 1082 (9th Cir. 2000).

118. *Id.* at 1087.

119. *See id.*

120. *Id.*

Brunt of the Harm Prong

For a number of years there was an intra-circuit split as to whether for the effects test to be met, the brunt of the harm must be felt in the forum state. With the court's en banc holding in *Yahoo!*, this question has been answered decisively: "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state."[121] While *Yahoo!*'s interpretation of the harm seems reasonable—and the brunt of the harm requirement arbitrary and not compelled by the holding in *Calder*—re-characterizing the harm element in this way has the impact of making the element much easier to meet in a given case. Since the Ninth Circuit (along with every other circuit) believes it is essential to place one or more limiting principles on the effects test, the express aiming element as the limiting factor becomes even more important. However, again, as noted immediately above, express aiming is a concept which does not define itself, and has not been adequately defined.

2. *Arising out of*

The second prong of the specific jurisdiction test reflects the principle that where jurisdiction is not premised on a traditional, territorial basis (e.g., either over the "person" or the *res*), nor is it premised on contacts with the jurisdiction which are akin to presence within the jurisdiction (i.e., general jurisdiction), due process requires some relationship between the cause of action and the defendant's jurisdictionally relevant contacts. The exact nature of the relationship between the jurisdictionally relevant contacts and the cause of action sued on is the subject of a rich theoretical debate in legal scholarship[122] and in the case law.[123] It's also a question both inherent in, and central to, personal jurisdiction law.

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121. *Yahoo!*, 433 F.3d at 1207.

122. *See generally* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583 (2001); Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545 (1994); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559 (1998); William M. Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1336–46 (1984) (book review); Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement: What Does It Mean?*, 50 WASH. & LEE L. REV. 1265 (1993).

123. *See, e.g.*, Davis v. Baylor Univ., 976 S.W.2d 5, 8 (Mo. Ct. App. 1998) ("The parties' disagreement in this case reflects the disagreement nationwide over the 'arise from or relate to,' requirement, which has never been clarified by the U.S. Supreme Court. The interpretation of this phrase has differed from jurisdiction to jurisdiction. To date, the courts have applied two general theories of interpretation for the 'arise from or relate to' requirement: (1) the 'but for' test, and (2) the proximate cause/substantive relevance test."); *see also* Vons Cos., Inc. v. Seabest Foods, Inc., 926 P.2d 1085, 1096 & n.4 (Cal. 1996) ("We recognize that the court in *Burger King* did not specifically discuss the further requirement that the claim 'arise out of' or be 'related to' the defendant's forum activity in

The Ninth Circuit has adopted a "but for" test for the "arising out of" prong. Adopted explicitly by the court in 1990 in *Shute v. Carnival Cruise Lines* based on prior Ninth Circuit case law,[124] the "but for" standard allows virtually any fact pattern which passes through the first prong to also pass through the "arising out of" prong. The Ninth Circuit's stated rationale for adopting a "but for" standard for assessing the relatedness of a defendant's cause of action to the defendant's contacts with the forum has been that:

> [A]doption of the more restrictive view of the "arising out of" requirement would preclude the exercise of jurisdiction in some cases where the plaintiff has established purposeful availment through continuing efforts to solicit business, some nexus between the cause of action and the defendant's forum-related activities, and the reasonableness of requiring the defendant to defend in the forum.[125]

Further, according to the court's stated rationale, the risk of establishing jurisdiction based on "too attenuated" contacts due to the liberality of the "but for" standard is not a problem because in that case "the exercise of jurisdiction would be unreasonable," and "[t]he third prong of the *Data Disc* test provides that protection."[126]

The Ninth Circuit's use of a "but for" standard for the "arising out of" prong has been controversial in the case law and in legal scholarship alike. The First Circuit, in particular, has been critical of its lack of a "limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain."[127] The First Circuit further questions the rationale for using the reasonableness prong of the test for errors which may be caused by the liberality of a "but for" standard in

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order to warrant the exercise of specific jurisdiction, and that the meaning of that requirement is implicated in the present case. . . . The high court has declined to clarify the relatedness element of specific jurisdiction." (citation omitted)).

124. 897 F.2d 377, 385 (9th Cir. 1990) ("Our circuit, in *Cubbage v. Merchent*, implicitly adopted the 'but for' test in analyzing whether a cause of action arises from a defendant's continuing efforts to solicit business in the forum state. Today, we make its adoption explicit.").

125. *Id.* at 385–86.

126. *Id.* at 385.

127. Nowak v. Tak How Invs., 94 F.3d 708, 715 (1st Cir. 1996). The First Circuit has been quite vocal in its criticism of the Ninth Circuit's approach to the relatedness inquiry:

> The Ninth Circuit is the most forceful defender of the "but for" test. In *Shute v. Carnival Cruise Lines*, the court stated that "but for" serves the basic function of relatedness by "preserving the essential distinction between general and specific jurisdiction." . . .
>
> *Shute* and its progeny represent the only explicit adoption of the "but for" test. Nonetheless, cases from other circuits suggest a similar approach. . . .
>
> . . . [We, however, believe a] "but for" requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.

Id. at 714–15 (citations omitted). The First Circuit's views of the Ninth Circuit's "but for" standard are colored, however, by its adoption of the seemingly polar opposite standard for relatedness, proximate cause: "This circuit, whether accurately or not, has been recognized as the main proponent of the proximate cause standard." *Id.* at 715.

the "arising out of" prong: "True, as the Ninth Circuit has noted, courts can use the reasonableness prong to keep Pandora's jar from opening too wide. But to say that the harm that might be done by one factor can be prevented by another is not, after all, an affirmative justification for the former."[128]

However, in the Ninth Circuit, while cases at times appear to turn on or at least be influenced by the relatedness of the cause of action to the defendant's contacts with the forum, almost none of the inquiry takes place in the analysis of the "arising out of" prong. The work of this relatedness inquiry almost always takes place, to the extent it does, in the analysis of the first prong. The finding of purposeful availment or purposeful direction, though, appears to be influenced by how closely related the cause of action is to the plaintiff's contacts with the forum.

As a result, almost no Ninth Circuit specific jurisdiction cases turn on the inquiry in the second prong. While each case contains the obligatory addressing of the "arising out of" question, usually cases contain only a paragraph, or at most two or three, stating that based on the same facts found in the inquiry under prong one, the "arising out of" prong is either met,[129] or not met. The use of a "but for" standard in the "arising out of" inquiry does not suggest that the Ninth Circuit lacks any serious inquiry into the relatedness of the cause of action and the defendant's contacts—rather, it suggests that inquiry takes place in prong one.[130]

3. Reasonableness

Some circuits follow the suggestion in the Supreme Court's language in *Burger King* that a reasonableness or fairness inquiry is optional following a finding of minimum contacts: "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[131] The Ninth Circuit, however, views the reasonableness inquiry as obligatory, and it has a longstanding

128. *Id.*

129. *See, e.g.*, Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1131–32 (9th Cir. 2003). However, Ninth Circuit case law is not completely uniform in performing a seemingly perfunctory analysis under the "arising out of" prong which appears to do no independent work in deciding the case. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1210 (9th Cir. 2006); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1123–24 (9th Cir. 2002).

130. This Author takes the position that conflating the relatedness inquiry with the contacts analysis leads to confusion and hard to follow analysis, as does the lack of any independent work being done in the "arising out of" prong. As a result, these modes of analysis are not the best approach doctrinally—as discussed, *infra*.

131. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

and carefully-articulated test for this third prong of the specific jurisdiction test.

Following *Burger King*, once a plaintiff has made a sufficient showing on the purposeful availment/direction and "arising out of" prongs, the burden shifts to the defendant to make a compelling case that jurisdiction would be unreasonable: "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[132]

The Ninth Circuit's reasonableness factors were first articulated in 1981, four years before *Burger King*, in *Insurance Co. of North America v. Marina Salina Cruz*.[133] While disclaiming it was doing so ("we shall not attempt to list all the factors that might, in a different case, be part of an assessment of the reasonableness of subjecting a defendant to jurisdiction"),[134] the *Insurance Co.* court identified what has turned out to be a remarkably adaptable and useful set of factors for evaluating the reasonableness of jurisdiction given a finding of minimum contacts on the first two prongs of the specific jurisdiction inquiry. The *Insurance Co.* court concluded by finding the following seven factors relevant:

> (A) the extent of the purposeful interjection into the forum state; (B) the burden on the defendant of defending in the forum; (C) the extent of conflict with the sovereignty of defendant's state; (D) the forum state's interest in adjudicating the dispute; (E) the most efficient judicial resolution of the controversy; (F) the importance of the forum to plaintiff's interest in convenient and effective relief; and (G) the existence of an alternative forum.[135]

The *Insurance Co.* court also established that the inquiry was a balancing one, and no one factor was likely to be determinative.[136]

Almost from the articulation of the test in 1981, these factors have been routinely applied in virtually every Ninth Circuit specific jurisdiction case, with the extent of the inquiry dependent on how detailed the evaluation of personal jurisdiction was, and on how important the reasonableness inquiry was to the result in the case. While how each factor is evaluated, and how the factors are balanced against one another, has developed and changed over the years of application, the elements themselves have stayed constant.

While not many cases are decided in the reasonableness prong—

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132. *Id.* at 477.

133. 649 F.2d 1266, 1270 (9th Cir. 1981).

134. *Id.*

135. *Id.* (citations omitted).

136. *Id.* at 1273 ("None of these factors is necessarily decisive nor, we emphasize, are these factors a litany to be applied in each case. Determining reasonableness is not an abstract exercise but must be approached with flexibility and must focus on the circumstances of a given case.").

most in fact are decided in the purposeful availment/direction prong—the reasonableness inquiry is a meaningful and substantive one. There are a number of Ninth Circuit cases whose holding with respect to jurisdiction has been decided on the basis of the reasonableness prong.[137]

The *Insurance Co.* court carefully and seemingly accurately identified then-available Supreme Court precedent in developing its seven factor test.[138] In applying its test, the Ninth Circuit has incorporated *Burger King*'s principle that once a showing of minimum contacts has been made, the burden shifts to the defendant to make a compelling case that jurisdiction is unreasonable. However, Ninth Circuit law on the reasonableness prong has not developed in any meaningful way another significant principle the Supreme Court outlined in *Burger King*. The *Burger King* Court identified that the reasonableness inquiry—after the minimum contacts inquiry—is subject to a sliding-scale type assessment of reasonableness. Once a certain (undefined) threshold showing of minimum contacts was made, whether or not jurisdiction was proper would depend on a balancing of minimum contacts, and reasonableness.

The Court in *Burger King* first pointed out that reasonableness factors may suggest jurisdiction was proper in the light of minimum contacts which were otherwise insufficient.[139] The Court went on to say that, on the other hand, even a sufficient showing of minimum contacts which would otherwise support jurisdiction may, in the face of an evaluation of reasonableness, nonetheless argue against jurisdiction.[140] Actively and effectively applying *Burger King*'s sliding scale concept of reasonableness has been largely absent in Ninth Circuit personal jurisdiction jurisprudence.

II. A MODEL FOR CONCEPTUALIZING THE SPECIFIC JURISDICTION INQUIRY

As the foregoing illustrates, the Ninth Circuit's three-prong test for specific jurisdiction is in some ways an articulated, coherent doctrine. In other ways, it is obscure and confusing.

Some of this obscurity results from the lack of guidance from the Supreme Court—with its confusing and not-fully articulated precedents,

137. *See* Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487 (9th Cir. 1993) ("[W]e will assume that purposeful availment prong has been satisfied. We need not decide this issue definitively, however, because we conclude in Part B that the exercise of jurisdiction would be unreasonable in any event."); *see also* FDIC v. British-Am. Ins. Co., Ltd., 828 F.2d 1439, 1442 (9th Cir. 1987).

138. The seventh factor, availability of an alternative forum, was the sole exception.

139. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) ("These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.").

140. *Id.* at 477–78 ("Nevertheless, minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.").

and its failure to issue a major personal jurisdiction holding in more than two decades.[141] Some of it results from the inherent difficulties in personal jurisdiction itself.

Given the lack of guidance from the Supreme Court, it is important that the Ninth Circuit sort through this complicated doctrinal area, and bring greater coherence and intelligibility to its personal jurisdiction cases. However, any reasonable and objective observer must be left with a sense of dissatisfaction with the Ninth Circuit's personal jurisdiction jurisprudence. Almost all cases are decided under the purposeful availment/purposeful direction prong, leaving little or no effective relevance to the "arising out of" and "reasonableness" prongs. Cases which apply purposeful direction and the effects test often seem less than clear about the manner in which they are doing so. Further, cases which should be (and arguably were) decided by the court on considerations of fairness and reasonableness, were ostensibly decided on questions of minimum contacts—leading to less than convincing opinions, and in some cases, less than satisfactory rules of law. Lastly, there is the anomaly of the second, "arising out of" prong doing almost no independent work in all but the most exceptional cases.

A. A Two-Stage Inquiry

While it is beyond the purview of this Note to suggest a doctrinal solution to these very real problems, it is at least appropriate to offer a way of thinking through the problem stated by the above, in the hopes it will help in the development of the solution to the problem. That lies in conceiving the specific jurisdiction inquiry as two sequential balancing inquiries.

1. The First Inquiry: Balancing Contacts Against Relatedness

First, the court must evaluate the nonresident defendant's contacts with the forum. A defendant's contacts may be availment of the privilege of acting with or in the forum, or they may be the direction of actions towards the forum or its residents. This latter, direction of actions, may involve no contacts with the forum other than the effects caused in the forum or to its residents. The defendant must have purposefully engaged in these acts of availment or direction.

These contacts are then weighed in light of the various causes of action brought by the plaintiff. The greater the relationship between the cause of action and the defendant's contact with the forum, the lesser the necessary showing of quantity and quality of contacts in order for there

141. *See, e.g.*, since *Burger King*, 471 U.S. 462 (1985). The Supreme Court has taken several personal jurisdiction cases since *Burger King* (for example, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), and *Burnham v. Superior Court*, 495 U.S. 604 (1990)), but no subsequent case has had *Burger King*'s doctrinal breadth or impact.

to be sufficient minimum contacts for personal jurisdiction. The limiting case would be where the defendant had one contact with the forum, but the cause of action directly arose out of the contact (e.g., the defendant entered the forum one time, driving his car, and was involved in an automobile accident in the forum). On the other hand, the lesser the relationship between the cause of action and the defendant's contact with the forum, the greater the necessary showing of quantity and quality of contacts in order for there to be sufficient minimum contacts for personal jurisdiction. However, the quality and quantity of the defendant's contacts with the forum would be so significant that they would be akin to physical presence, and hence jurisdiction over an unrelated cause of action would not be unjust. The limiting case would be general jurisdiction, where the plaintiff's cause of action would not have any relationship with the defendant's forum contacts.

Hence, the first step of the initial inquiry is an assessment of contacts. The second step of the initial inquiry is an assessment of the extent to which the cause of action arises out of those contacts. To the extent there is a thumb on the scales in this inquiry—and there must be—there must be a bias towards the necessity for some relationship between the contacts and the cause(s) of action. Not a strict, proximate cause relationship—but there must be some showing of some connection, in most cases, with the greater the contacts the lesser the showing required. The proper presumption is that it would be unjust to subject the nonresident to jurisdiction, and the burden of persuasion is on the plaintiff to show that it is in fact just (or, to be doctrinally correct, that it would be in accord with due process of law).

TABLE I: THE FIRST INQUIRY: BALANCING CONTACTS AGAINST RELATEDNESS

QUADRANT II Possible General Jurisdiction High Contacts Low "Arising out of"	QUADRANT III Jurisdiction High Contacts High "Arising out of"
QUADRANT I No Jurisdiction Low Contacts Low "Arising out of"	QUADRANT IV Possible Specific jurisdiction Low Contacts High "Arising out of"

Table I, immediately above, visually shows this inquiry—where specific cases would be plotted according to their contacts and the relatedness of those contacts to the cause of action, in order to establish a preliminary finding of jurisdiction. Of course, the balancing inquiry referred to in this first stage of the personal jurisdiction inquiry is simply assessing prongs one and two (purposeful availment/direction and "arising out of") of the traditional specific jurisdiction test—but considering prongs one and two as a single balancing inquiry, rather than two distinct inquiries. This approach explicitly recognizes the relationship between the first two prongs of the specific jurisdiction test. It considers them separately, then together, in formulating a preliminary finding on the question of jurisdiction. It also avoids the current practice in the Ninth Circuit of doing all the work of assessing contacts and relatedness in its evaluation of prong one—without exposing carefully the court's analysis in doing so—then leaving the "arising out of" prong to a mere formality which does no work in the analysis.

2. *The Second Inquiry: Assessing Reasonableness of Jurisdiction*

However, the initial balancing of the contacts and the cause(s) of action is only the first step of a two-stage balancing inquiry. The outcome of weighing the contacts identified in prong one against the level of relatedness of those contacts to the cause(s) of action in prong two will result in some cases with a clear showing of jurisdiction, or of no jurisdiction. If so, the court's inquiry is finished.

In other cases the issue of jurisdiction is still undecided after the initial stage of the court's inquiry. In those cases, the court will either find the argument for jurisdiction based on contacts and relatedness persuasive, but not decisively so, or on the other hand, not persuasive, but not decisively so. These cases, and only these cases, will be subjected to the reasonableness inquiry. Table II immediately below visually shows the reasonableness inquiry. This inquiry—prong three of the traditional specific jurisdiction test—is also conceptualized as a balancing test, related to the other two prongs of the test. Like the first stage of the inquiry noted above, analyzing each prong in the light of its interrelatedness with the other two prongs of the jurisdictional inquiry will require the court to make (and assist it in making) its analysis of the jurisdictional question fully explicit. It also requires the court to apply the Supreme Court's teaching in *Burger King* that the reasonableness inquiry is at the discretion of the court, and that it can lead to a finding of jurisdiction where the defendant's contacts are not otherwise sufficient, or to a finding of no jurisdiction where the defendant's contacts are otherwise sufficient.

TABLE II: THE SECOND INQUIRY: ASSESSING REASONABLENESS OF JURISDICTION

QUADRANT II Possible Jurisdiction Jurisdiction More Reasonable Less "Contacts and Arising out of"	QUADRANT III Jurisdiction Jurisdiction More Reasonable More "Contacts and Arising out of"
QUADRANT I No Jurisdiction Jurisdiction Less Reasonable Less "Contacts and Arising out of"	QUADRANT IV Possible Jurisdiction Jurisdiction Less Reasonable More "Contacts and Arising out of"

Another benefit of the approach outlined above is to allow the court to explicitly consider questions relevant to reasonableness of jurisdiction which are at times *sub rosa* (but rarely explicit) considerations which drive the court's analysis and even decision on personal jurisdiction. For example, the Ninth Circuit's reasonableness factors as currently applied rarely give substantial weight to the plaintiff's convenience against the defendant's inconvenience. This appears to be the result of the current failure to apply a thumb on the scales in favor of the defendant[142] in the inquiry under the first two prongs. Hence, the language one sees frequently in Ninth Circuit reasonableness inquiries that the inconvenience to the defendant is usually the most important factor—and the inconvenience to the plaintiff less so.

In the model described here, though, the presumption against jurisdiction (which arises facially in a specific jurisdiction inquiry since there is neither a traditional basis for jurisdiction or general jurisdiction over the defendant in the forum) has already been factored into the contacts and relatedness inquiry. Now, in the reasonableness inquiry, substantial imbalances between the convenience to the plaintiff and the defendant can fairly be weighed—in either direction (for or against jurisdiction), and against all the other reasonableness factors. Presumably, no case should be subjected to a reasonableness inquiry unless it's a relatively close case. However, there may be those exceptional cases which can be decided on reasonableness alone, independent of the minimum contacts and relatedness balancing inquiry.

142. And of course, against jurisdiction.

In such a model, in addition to the case-specific efficiency factors (the forum non conveniens-like factors such as access to witnesses and evidence, familiarity with substantive law to be applied, etc.), the court should explicitly consider overall efficiency concerns for the judicial system as a whole. It is here, for example, that concerns of whether all defendants and causes of action can be brought before a single court, then, would become a factor, among others, to be weighed.

CONCLUSION

Personal jurisdiction law is a doctrinal area of great importance to courts, litigators, and litigants alike. Given the complexities and interrelationships of personal jurisdiction doctrines, and the lack of Supreme Court case law in the area for the past couple of decades, the most coherent body of personal jurisdiction case law is currently the standards, rules and modes of analyses which have been developed in each of the federal circuit courts of appeals. The Ninth Circuit's case law in the area of personal jurisdiction is among the most influential and most thoroughly developed of the several circuits.

This Note starts from the premise that a statement of the personal jurisdiction law of the Ninth Circuit—its standards, rules and modes of analysis—should be of interest in its own right, especially since there is no statement of same in the extant record of legal scholarship. This Note, then, has attempted—in an albeit preliminary and summary fashion—to trace several of the major holdings of Ninth Circuit personal jurisdiction case law—both their history, and how they operate and interrelate.

This Note has looked at the Ninth Circuit's specific jurisdiction law—which represents the vast majority of litigated personal jurisdiction cases. It described how the several prongs of the specific jurisdiction test are applied in practice, and concluded with a model for re-conceptualizing the specific jurisdiction inquiry. It posits that the elements of Ninth Circuit specific jurisdiction inquiry are the correct ones (and are consistent with Supreme Court guidance and principles), but the mode of analysis is not.

The traditional mode of analysis applied in Ninth Circuit case law assumes that each element of the inquiry is distinct and stand-alone, when in fact the personal jurisdiction inquiry is inherently a two-phase, balancing inquiry into those three factors and their interrelationships. This leads to at times murky analysis, and the court's often failing to provide explicit guidance as to how it has in fact evaluated and decided the question of personal jurisdiction, and led to at times unsatisfactory precedent and rules of law.

Ultimately, however, it is with a measure of sincere humility that this Note is offered as a part of the debate on personal jurisdiction law. This Author hopes it will be accepted as a gesture of respect to the judges and

justices who have developed and continue to work in this area of the law. This Author's immersion in Supreme Court and Ninth Circuit case law has left him with a sense of awe at the intelligence, care, and at times brilliance of the work of the jurists who have opined in this complicated, important area of the law.